No. 15,026

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL, ITS AGENT, NATHAN FLEISHER, AND LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sec. 151, *et seq.,* set forth in relevant part in the Appendix *infra*), for the enforcement of its order issued against respondents on August 26, 1955, following the usual proceedings under Section 10. The Board's decision and order (R. 48-66)[1] are reported in 113 NLRB No. 123. This Court has juris-

[1] References to portions of the printed record are designated "R." Wherever a semicolon appears, the references preceding the semicolon are to the Board's findings; those following the semicolon are to the supporting evidence.

diction of the proceeding under Section 10(e) of the Act, the unfair labor practices having occurred in Los Angeles, California, within this judicial circuit.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

The Board found that respondents, in violation of Section 8 (b) (4) (A) of the Act, induced or encouraged employees to engage in a concerted refusal to install "non-union" doors, manufactured by Paine Lumber Company, with an object of forcing their employer and others to cease doing business with Paine or to cease handling its products. The subsidiary facts upon which the Board based its findings may be summarized as follows:

A. *The business of the employers affected*

The unfair labor practices found by the Board arose out of respondents' inducement of employees of Havstad and Jensen to refuse to handle doors at the construction site of the White Memorial Hospital, in Los Angeles, California. Havstad and Jensen were engaged by the College of Medical Evangelists, a religious organization, as the general contractor for the construction of the hospital and other buildings on the college campus (R. 17; 124-125, 187-188). The doors in question were manufactured by Paine Lumber Company of Oshkosh, Wisconsin, and were obtained by Havstad and Jensen from Watson and Dreps, millwork contractors in Los Angeles. Watson and Dreps, in turn, had purchased the doors from Sand Door and Plywood Company, which is engaged in the wholesale jobbing of plywood doors and allied building materials

in the Los Angeles area and is the exclusive Southern California distributor for Paine (R. 16-17; 169-171, 173-174, 184-185).

In 1953, the value of shipments of materials, including doors, from Paine in Wisconsin to Sand Door in California, amounted to $185,796.84, and from January 1, 1954, through September 8, 1954, such shipments amounted to $103,503.05 (R. 17; 172-173). The doors in controversy have a value of $9,148.32. They were received by Sand Door from Paine early in August 1954, whereupon Sand Door notified Watson and Dreps, who picked them up and delivered them to the construction site by August 17 (R. 18; 173-175, 185, 198).

B. *The unfair labor practices*

On August 17, 1954, the Paine doors having been delivered to the construction site, Havstad and Jensen's carpenter foreman, Steinert, in accordance with instructions from Superintendent Nicholson, assigned laborers to distribute the doors from floor to floor, and directed carpenter Sam Agronovich to start hanging the doors (R. 18; 110-112, 163-165). Later that morning, Nathan Fleisher, business agent of respondent Local 1976, came to the building site and told Steinert that the men would have to stop hanging the doors, which did not have a United Brotherhood of Carpenters' label, until it was determined whether or not they were union doors (R. 18, 52-53; 165-166).

Steinert, as was required of carpenter foremen under respondent District Council's By-Laws and Trade Rules, was a member of a constituent local of the District Council, respondent Local 1976 (R. 53; 199, 162-163). As a foreman member of the Union he was

vested with the authority and responsibility to enforce the district Council's By-Laws and Trade Rules, which included the rule barring union members from handling nonunion materials (R. 53; 199). Accordingly, upon receiving orders from Fleisher, Steinert immediately stopped the employees from distributing the doors to the different floors (R. 53; 165). Then, accompanied by Fleisher, Steinert went to carpenter Sam Agronovich and told him to discontinue hanging the doors because they were not union made (R. 18, 53; 165-166).

About 11 a.m., James Nicholson, general superintendent of construction for Havstad and Jensen, arrived at the job site and learned that the doors were not being hung (R. 18-19; 106, 113-116). Nicholson walked up to Business Agent Fleisher, who was talking with Steinert and carpenter Finkelstein, and asked why he had stopped work on the doors (R. 19, 54; 116-118). Fleisher replied that he had "orders from the District Council that morning to stop them from hanging the doors" and that he "could have pulled them off yesterday but . . . waited until today" (R. 54; 117). At this point, carpenters Sam Agronovich and Saul Agronovich (who was also union steward) approached. Superintendent Nicholson told them that they might as well pick up their tools, but upon reconsideration told Steinert to assign them to other work. (R. 19; 117-119).

On that day and the next, James Barron, vice president and general manager of Sand Door, had telephone conversations with Earl Thomas, a representative of respondent District Council, who advised him that they had checked with a local of the Union in Wisconsin and found that the doors were not union made (R. 19; 175-180). Though Barron pointed out that Sand Door, Wat-

son and Dreps, and Havstad and Jensen all hired union men and were therefore innocent bystanders, Thomas insisted that they could not permit the hanging of the nonunion door and suggested that Sand Door had better cancel its orders with Paine and buy union doors (R. 19; 178-179). Barron also talked to Business Agent Fleisher, who told him that the doors did not have a union label and that they would have to be "cleared" before they could be hung (R. 19; 181-184). Emmett Jensen of Havstad and Jensen also talked to District Council Representative Thomas, who told him that, since they had ascertained that the doors were nonunion, the carpenters would not be able to hang them (R. 19; 190-191).

Thereafter, on October 5, Superintendent Nicholson and Steinert asked each carpenter employee on the hospital job if he would be willing to hang the doors (R. 20; 120-121, 138-150, 166-167). Each of the carpenters replied, in substance, that he would not unless clearance was obtained from the Union (*ibid.*).

At the time of the foregoing events, there was in effect a labor agreement negotiated between respondents' parent, United Brotherhood of Carpenters, and the Building Contractors' Association of Southern California, of which Havstad and Jensen were members. This agreement provided, *inter alia,* that "Workmen shall not be required to handle nonunion material" (R. 17-23, 57; 203).

II. The Board's Conclusions and Order

Upon the foregoing facts, the Board, with two members dissenting from these conclusions, held that it would effectuate the policies of the Act to assert juris-

diction in this case, and that respondents' activities had violated Section 8 (b) (4) (A) of the Act (R. 48-80). Thus, the Board found that respondents had induced the employees of Havstad and Jensen to engage in a concerted refusal to install nonunion doors manufactured by Paine, with the objects of forcing Havstad and Jensen to cease using or handling Paine products and of forcing Sand Door to cease doing business with Paine (R. 52-57). In arriving at this finding, the Board rejected respondents' contention that there was no inducement of a concerted refusal within the meaning of Section 8 (b) (4) (A) since, under the outstanding contract between the builders and the Union (p. 5, *supra*), Havstad and Jensen had acquiesced in their employees' refusal to handle such doors (R. 57-63).

The Board's order (R. 64-66) requires respondents Local 1976 and the District Council and their agents, including respondent Fleisher, to cease and desist from the unfair labor practices found and to post appropriate notices.

SUMMARY OF ARGUMENT

I

The Paine Lumber Company, whose products were the ultimate target of respondents' actions, ships materials value in excess of $100,000 per annum, from its plant in Wisconsin to its Southern California distributor, Sand Door. Respondents, by barring the use of these products on the Havstad and Jensen hospital project in Los Angeles, thereby interfered with more than a *de minimis* flow of shipments into that state, which is sufficient to bring respondents' activity within the Board's legal jurisdiction.

The impact on commerce was also sufficient to warrant the Board in asserting jurisdiction as a matter of policy. The primary employer here was Paine, and its direct out-of-state shipments, exceeding $50,000, alone were more than sufficient to meet the criteria announced by the Board in *Jonesboro Grain Drying Co-operative,* 110 NLRB 481, 483-484, and *Jamestown Builders Exchange,* 93 NLRB 386, 387.

II

Aside from the two defenses considered hereafter, this case is essentially the same as *N.L.R.B.* v. *Washington-Oregon Shingle Weavers District Council,* 211 F. 2d 149 (C.A. 9), enforcing *Sound Shingle Co.,* 101 NLRB 1159. There, as here, the union induced its members to cease handling a product which was manufactured under conditions not favored by the union; the Board found, and this Court agreed, that such conduct was within the ban of Section 8(b)(4)(A) of the Act, even though the union did not have a specific dispute with the manufacturer of the disfavored product.

A. Respondents' principal defense is that the inducement of the employees of Havstad and Jensen to stop handling Paine doors was not violative of Section 8(b)(4)(A) because here, unlike in *Shingle Weavers,* there was a contract between Havstad and Jensen and the Union wherein the parties had agreed that "Workmen shall not be required to handle nonunion material." This contention rests on the premise that employees cannot be induced to engage in a "concerted refusal in the course of their employment to . . . work on any goods," as those terms are used in Section 8(b)(4)(A), unless the work stoppage brought about by the union

is contrary to the wishes of the employer. For the following reasons, the Board properly rejected this contention:

1. Section 8(b)(4)(A) was intended to protect not only the particular neutral employer whose employees are induced by the union (i.e., Havstad and Jensen), but all other neutral employers (i.e., Sand Door, and Watson and Dreps) who, as a result of the union's action, are enmeshed in a dispute not their own. Moreover, that Section was intended "to protect the public from strikes or concerted refusals interrupting the flow of commerce at points removed from primary labor-management disputes" (R. 60). To hold that a union's inducement of employee refusals to handle a product is not interdicted by Section 8(b)(4)(A) where their employer has acquiesced in this action, overlooks the interests of the other neutral employers and the public.

2. The legislative history of Section 8(b)(4)(A) indicates that Congress intended to ban the type of activity involved here, irrespective of employer consent to the union's program. Thus, Senator Taft specifically stated that the Section was designed to reach, *inter alia,* the practice of the United Brotherhood of Carpenters of having their members refuse to work on lumber or lumber products which did not bear that union's label. Since for years this policy has been implemented by arrangements and agreements between the union and employers of its members, it is reasonable to assume that Congress was well aware of the factor of employer acquiescence, and decided, notwithstanding that factor, to ban union inducement of employer refusals to work on an unfavored product.

3. The conclusion that employer consent does not in-

sulate union inducement of employees from the ban of Section 8(b)(4)(A) is consistent with the language of that provision. Section 8(b)(4)(A) prohibits the inducement of employees to engage in "a strike or a concerted refusal in the course of their employment to . . . work on any goods . . . , where an object thereof is (A) forcing or requiring any . . . employer or other person . . . to cease doing business with any other person." Read literally, the "concerted refusal" phrase proscribes inducing employees to refuse while at work, to perform a task which they would have done absent the inducement. There is no express qualification for cases where their employer has agreed to the refusal, nor is such qualification imported into the phrase by the other terms of the Section.

B. Respondents' second basic defense is that the action of carpenter foreman Steinert in stopping the handling of nonunion doors cannot be attributed to them because he was acting as an agent of Havstad and Jensen. However, Steinert was a member of respondent local, and was vested with the responsibility of enforcing its trade rules, including the one barring members from handling nonunion materials. Accordingly, when Business Agent Fleisher ordered Steinert to stop the work on the doors because they were nonunion, it was reasonable for the Board to conclude that Fleisher was invoking Steinert's obligations under the Union's rules and made him the Union's agent for their enforcement. This conclusion is confirmed by the fact that Fleisher made his request to Steinert instead of to General Superintendent Nicholson, the management official who normally dealt with Fleisher with respect to management-union matters.

ARGUMENT

I. THE BOARD PROPERLY ASSERTED JURISDICTION HERE

The facts summarized in the statement (pp. 2-3, *supra*) show that Paine Lumber Company, whose products were the ultimate target of respondents' actions, ships materials valued in excess of $100,000 per annum, from its plant in Wisconsin to its Southern California distributor, Sand Door. Respondents, by barring the use of these products on the Havstad and Jensen hospital project in Los Angeles, thereby interfered with more than a *de minimis* flow of shipments into that state, which is sufficient to bring respondents' activity within the Board's legal jurisdiction. See *N.L.R.B.* v. *Denver Bldg. & Construction Trades Council,* 341 U.S. 675, 683-685; *N.L.R.B.* v. *Local 74, United Brotherhood of Carpenters*, 181 F. 2d 126, 129-131 (C.A. 6), affirmed, 341 U.S. 707.[2]

However, even though a dispute may have a sufficient impact on commerce to be subject to the Board's jurisdiction as a matter of law, the Board may decline to assert that jurisdiction if the policies of the Act would best be served by conserving its budget and manpower for other cases with more substantial impacts upon commerce.[3] Before the Board, respondents

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[2] Insofar as the Board's legal jurisdiction is concerned, it is irrelevant that Havstad and Jensen obtained the products of Paine from an intermediary in California (Watson and Dreps), rather than by direct shipment from out-of-state. See *N.L.R.B.* v. *Cowell Portland Cement Co.*, 148 F. 2d 237, 242 (C.A. 9), cert. den., 326 U.S. 735; *N.L.R.B.* v. *Townsend*, 185 F. 2d 378, 382-383 (C.A. 9), cert den., 341 U.S. 909.

[3] See *N.L.R.B.* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 684; *Haleston Drug Stores* v. *N.L.R.B.*, 187 F. 2d 418, 421 (C.A. 9), cert. den., 342 U.S. 815; *Optical Workers Union* v.

contended that jurisdiction here should have been declined for these policy reasons. If this question is reviewable at all,[4] we submit that the Board was warranted in concluding that the policies of the Act would be effectuated by asserting jurisdiction in this case.

The Board has formulated criteria for ascertaining the cases in which jurisdiction would be asserted, and the two relevant here were enunciated in *Jonesboro Grain Drying Cooperative,* 110 NLRB 481, 483-484, and *Jamestown Builders Exchange,* 93 NLRB 386, 387. In the former case, the Board announced, *inter alia,* that it would assert jurisdiction over an enterprise which produces materials for direct out-of-state shipment, where the value of such shipment is $50,000 or more per annum. In the latter case, it stated that (93 NLRB at 387):

> in determining whether the Board will assert jurisdiction in cases in which secondary boycotts are alleged, we must consider not only the operations of the primary employer, but also the operations of any second[ary] employers, to the extent that the latter are affected by the conduct involved. Of course, if the operations of the primary employer alone meet the minimum requirements

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N.L.R.B., 227 F. 2d 687 (C.A. 5), pet. for rehearing den., 229 F. 2d 170, cert. den., 24 L.W. 3328; *Teamsters Local No. 183* v. *N.L.R.B.*, No. 14779 (C.A. 9), decided June 14, 1956.

[4] As this Court said in *N.L.R.B.* v. *Stoller,* 207 F. 2d 305, 307, cert. den., 347 U.S. 919:

> The general rule is that, where the Board has jurisdiction * * * whether such jurisdiction should be exercised is for the Board, not the courts, to determine.

See also, *Electrical Workers* v. *N.L.R.B.,* 181 F. 2d 34, 36 (C.A. 2), affirmed, 341 U.S. 694.

> under the Board's current policy, jurisdiction should be asserted without further inquiry. Where, however, the operations of the primary employer do not satisfy the Board's jurisdictional standards we must, in addition, consider the operations of the secondary employer . . . If, taken together, the business of the primary employer and that portion of the secondary employers' business which is affected by the alleged boycott meet the minimum standards, jurisdiction ought to be asserted.[5]

The instant case clearly satisfies these criteria. As the Board correctly noted (R. 51), in the case of a product boycott, even in the absence of an active dispute between the union and the manufacturer of the boycotted product, the manufacturer is a primary employer within the meaning of the *Jamestown* rule.[6] Thus, the primary employer here was Paine, and its direct out-of-state shipments exceeded the $50,000 minimum announced in *Jonesboro Grain, supra.* Accordingly, it was unnecessary under the *Jamestown* formula to consider the operations of any of the other (or secondary employers), the primary employer's

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[5] The business of the primary and secondary employers are combined in the case of a secondary boycott because "the secondary activity is but an extension of the labor dispute with the primary employer" (*N.L.R.B.* v. *Associated Musicians,* 226 F. 2d 900, 907 (C.A. 2), cert. den., 24 L.W. 3328). See also, *Jamestown Builders,* 93 NLRB at 387. Moreover, this procedure recognizes "that the real effect of a secondary boycott in the building and construction industry is the stoppage of the flow of building materials from the manufacturers to the dealers and thence to the contractors" (*Joliet Contractors Ass'n* v. *N.L.R.B.,* 193 F. 2d 833, 840 (C.A. 7)).

[6] See *Sound Shingle Co.,* 101 NLRB 1159, enforced, 211 F. 2d 149 (C.A. 9).

business alone being sufficient to warrant the Board in asserting jurisdiction.[7]

II. THE BOARD PROPERLY FOUND THAT RESPONDENTS VIOLATED SECTION 8 (b) (4) (A) OF THE ACT BY INDUCING EMPLOYEES OF HAVSTAD AND JENSEN TO REFUSE TO INSTALL PAINE DOORS

A. *Introduction*

Section 8 (b) (4) (A) of the Act, in relevant part, makes it an unfair labor practice for a labor organization or its agents:

> to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use . . . or otherwise handle or work on any goods, . . . materials . . . , where an object thereof is: (A) forcing or requiring . . . any employer or other person to cease using . . . the products of any other . . . manufacturer, or to cease doing business with any other person.

As we shall show, there is no serious question that Union member Steinert, pursuant to instructions from Business Agent Fleisher, induced employees to engage in a concerted work stoppage for the object proscribed

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[7] This conclusion is not impaired by the circumstance (see Member Peterson's dissent, R. 68-71) that, in certain other types of cases, the Board has declined, as a matter of policy, to assert jurisdiction where the business involved in the labor dispute is "twice removed" from interstate commerce (e.g., *Brooks Wood Products*, 107 NLRB 237). Since a secondary boycott is involved here, it cannot be said that Paine is "twice removed" from Havstad and Jensen (see n. 5, *supra*); the former is indeed the primary employer in the labor dispute, and, as it ships out-of-state, its business clearly exerts a direct impact on commerce.

by Section 8 (b) (4) (A). Respondents' principal defenses are: (1) that, though the employees of Havstad and Jensen may have been induced in concert to stop work, this was not a "refusal in the course of their employment," as contemplated by Section 8 (b) (4) (A), since their employer acquiesced in the employees' action; and (2) that respondents, in any event, were not responsible for Steinert's conduct because he acted as an agent of the employer rather than of the Union.

For reasons discussed at pp. 17-28, *infra,* we submit that the Board properly rejected these defenses. Before reaching these issues, however, we shall show (pp. 14-17, *infra*) that all of the elements of a violation of Section 8(b)(4)(A) are otherwise present here.

B. *The facts establish that Steinert induced a concerted work stoppage for an object proscribed by Section 8(b)(4)(A)*

As detailed at the outset (pp. 3-4), on the arrival of the Paine doors at the project, Havstad and Jensen's carpenter foreman Steinert, in accordance with instructions from Superintendent Nicholson, assigned laborers to distribute the doors from floor to floor of the hospital building, and directed carpenter Sam Agronovich to start hanging the doors. Later that morning, Business Agent Fleisher told Steinert that the men would have to stop handling the doors because they appeared to be nonunion. Thereupon Steinert, who, as a foreman member of the Union, was charged with the responsibility of enforcing its Trade Rule against working on non-union materials, ordered the laborers to stop distributing, and Sam Agronovich to

discontinue hanging, the doors. The men ceased work on the doors, and, when Superintendent Nicholson subsequently arrived on the scene, Fleisher replied, in the presence of Steinert and carpenter Finkelstein, that he had "orders from the District Council . . . to stop them from hanging the doors."

On these facts, the Board was fully warranted in concluding that Steinert, pursuant to instructions from Business Agent Fleisher, induced and encouraged the laborers and carpenters employed by Havstad and Jensen to engage in a concerted refusal to handle Paine doors. This is further emphasized by the fact that, when several months later the carpenters were asked to resume handling the doors, they replied that they would not unless clearance was obtained from the Union (p. 5, *supra*).

It is equally clear that the above-described work stoppage was for an object proscribed by Section 8 (b) (4) (A), i.e., to require Havstad and Jensen and, in turn, Sand Door to discontinue handling or dealing in Paine doors. Relevant in this connection is District Council representative Thomas' conversation with Barron of Sand Door a few days after Fleisher's visit to the hospital project. Barron pointed out that Sand Door, Watson and Dreps, and Havstad and Jensen all hired union men and thus were innocent bystanders. Thomas replied that, nevertheless, the Union could not permit the hanging of non-union doors He went on to suggest that, if Sand Door cancelled all stock orders and placed no further orders with Paine, clearance might then be obtained for the doors purchased for Havstad and Jensen and certain other stock on hand (pp. 4-5, *supra*).

Without merit is respondents' contention that the work stoppage was not for an object proscribed by Section 8 (b) (4) (A) because it was legitimate primary activity. The contention assumes that the purpose of the work stoppage was merely to require Havstad and Jensen to use union-made materials as contemplated by their contract with the Union (p. 5, *supra*), and that Paine could not have been the ultimate target of such activity since respondents had no active labor dispute with it.

The first assumption is rebutted by the fact that Business Agent Fleisher neither contacted the appropriate officials of Havstad and Jensen about the contract (see p. 27, *infra*), nor referred to it in directing Steinert to stop the men from handling Paine doors. It also overlooks the discussion *supra,* between Thomas and Barron, showing that respondents' interest extended beyond Havstad and Jensen.[8] In any event, as we show pp. 17-25, *infra,* the existence of the Havstad and Jensen contract would not privilege the measures taken by respondents to secure compliance therewith.

The second assumption, that a product boycott is not within Section 8 (b) (4) (A) unless the union has an active dispute with the manufacturer of the disfavored product, was rejected by this Court in *N.L.R.B.* v. *Washington-Oregon Shingle Weavers District Council,* 211 F. 2d 149, enforcing *Sound Shingle Co.,* 101 NLRB 1159. There, as here, the union induced its members to cease handling a product which was manu-

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[8] Cf. *N.L.R.B.* v. *Local 74, United Brotherhood of Carpenters,* 341 U.S. 707, 713: It "is enough that one of the objects of the action complained of was to force Stanley to cancel Watson's contract."

factured under conditions not favored by the union; the Board found, and this Court agreed, that such conduct was within the ban of Section 8 (b) (4) (A), even though the union did not have a specific dispute with the manufacturer of the disfavored product. For, as the Court noted (211 F. 2d at 152):

> The prohibited object of the boycott is stated by the statute to be "forcing . . . any employer or other person to cease using . . . the products of any other producer, processor or manufacturer . . ." This is a prohibited object whether the union has or has not a dispute with such "other producer, processor or manufacturer."[9]

See also, *Wadsworth Bldg. Co.*, 81 NLRB 802, 805-807, enforced, *sub. nom., N.L.R.B.* v. *United Brotherhood of Carpenters,* 184 F. 2d 60 (C.A. 10), cert. den., 341 U.S. 947; pp. 22-23, *infra.*

C. *There was inducement of a concerted refusal in the statutory sense notwithstanding the contract between Havstad and Jensen and the Union*

Respondents' principal defense is that the inducement of the employees of Havstad and Jensen to stop handling Paine doors was not violative of Section 8 (b) (4) (A) because, by virtue of the contract in effect between Havstad and Jensen and the Union, which provided that "Workmen shall not be required to handle nonunion material" (p. 5, *supra*), Havstad and Jen-

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[9] The Court did not reach the further question discussed *infra,* whether "an employer may bind himself to handle unfair goods and if he does so, [whether] a strike to enforce such an agreement [would be] a violation of Section 8 (b) (4) (A)," for it found no such agreement there (211 F. 2d at 153).

sen had acquiesced in the work stoppage. This contention, which was accepted by the dissenting Board members (R. 71-80), rests on the premise that the phrase, "concerted refusal in the course of their employment to . . . work on any goods," contained in Section 8 (b) (4) (A), means not merely a refusal to work, but a refusal which is contrary to the wishes of the employer. We shall show that the Board properly concluded that the "hot cargo" clause in the contract here did not bar an unfair labor practice finding.

The reasoning underlying the view that employees cannot be induced to engage in a "concerted refusal in the course of their employment" where their employer has acquiesced in the work stoppage may be summarized as follows: The term "strike," which is linked with "concerted refusal" in Section 8 (b) (4) (A) (p. 13, *supra*), presupposes employer resistance to the demand for which the strike is called;[10] "concerted refusal" merely serves the function of encompassing within the Section activity which is less than a full strike, but otherwise partakes of the elements of a strike. Moreover, Section 8 (b) (4) (A) only proscribes a concerted refusal when it occurs in the course of the employees' employment, and, when an employer acquiesces in his employees' failure to perform certain tasks, he has in effect taken the work out of this area. Finally, since the objective proscribed by the Section is "forcing or requiring any employer or other person" to cease handling another's products, this could result only if the employees have been asked to take action contrary to their employer's wishes or orders.

The Board, at first accepted this interpretation of

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[10] See *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 256.

the terms of Section 8 (b) (4) (A).[11] But, after further experience and study,[12] a majority of the Board concluded that, to read "concerted refusal in the course of their employment" as covering only refusals which are contrary to the employer's wishes, is not required by the structure of the Section, and does not fully effectuate its purposes. Accordingly, in the instant case, the earlier Board decisions on this question (n. 11, *supra*) were overruled, and it was held that, regardless of employer acquiescence, "any direct appeal to employees by a union to engage in a strike or concerted refusal to handle a product is proscribed by the Act when one of the objectives set forth in Section 8 (b) (4) (A) is present" (R. 62).[13]

The following considerations support, and demonstrate the propriety of this holding:

1. Section 8(b)(4)(A) was intended to protect not only the particular neutral employer whose employees are induced by the union, (i.e., Havstad and Jensen), but all other neutral employers (i.e., Sand Door, and Watson and Dreps), who, as a result of the union's

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[11] *Rabouin, d/b/a Conway's Express,* 87 NLRB 972, 982, enforced, 195 F. 2d 906, 912 (C.A. 2); *Pittsburgh Plate Glass Co.,* 105 NLRB 740, 743-744.

[12] Cf. *Packard Motor Car Co.* v. *N.L.R.B.,* 330 U.S. 485, 482-493.

[13] Two members of the Board majority (Chairman Farmer and Member Leedom), without passing upon the validity of such a clause vis-a-vis the parties thereto (R. 59), concluded that it provided no defense where the union had approached the contracting employer's employees directly and all the other elements of an 8 (b) (4) (A) violation existed. The third member of the majority (Member Rodgers) declared the contract itself to be against public policy (R. 66-68). Cf. *McAllister Transfer Inc.,* 110 NLRB 1769. The positions reflected in *Sand Door* have subsequently been affirmed in *American Iron Machine Works,* 115 NLRB No. 121, 37 LRRM 1395 (March 15, 1956).

action, are embroiled in a dispute not their own.[14] Thus, the Section proscribes "forcing or requiring . . . any employer or *other person*" to cease doing business with another; the phrase "other person" serves no purpose unless the shield of the Section extends beyond the employer of the induced employees[15] Moreover, as the Board noted, in Section 8(b)(4)(A) "Congress intended to protect the *public* from strikes or concerted refusals interrupting the flow of commerce at points removed from primary labor-management disputes" (R. 60, emphasis added).[16]

To hold that union inducement of employee refusals to handle a product is not interdicted by Section 8(b)(4)(A) where their employer has acquiesced in this action, overlooks the interests of the other neutral employers and the public. In short, though Havstad and Jensen may have acquiesced in respondents' action in causing their employees to discontinue handling Paine doors, this does not lessen the resultant impact of the action on the non-consenting Sand Door and Watson and Dreps, who thereby incur a reduced market for Paine doors, and on the non-consenting members of the public, whose housing costs may thereby be increased. Hence, it can hardly be assumed that Congress intended that the acquiescence of Havstad and Jensen would obliterate the statutory protection accorded the other neutral parties in this case.

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[14] Indeed, the record shows direct negotiations between the Union and Sand Door (pp. 4-5, *supra*).

[15] As Senator Taft stated (93 Cong. Rec. 4198): "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees."

[16] See the preamble to the Act (Section 1 (b)), and the legislative history set forth in the Board opinion herein (R. 60-61, n. 21).

This conclusion is not impaired by the circumstance, relied on by the dissenting Board members (R. 74-76), that, since the inducement of "employers" is not proscribed by Section 8(b)(4)(A), had the Union achieved a cessation of work on Paine doors by appealing to Havstad and Jensen directly, rather than to their employees, there would be no violation despite a resultant injury to the interests of other neutral employers and the public. Congress, for various reasons (see *Rabouin, d/b/a Conway's Express* v. *N.L.R.B.*, 195 F. 2d 906, 911-912 (C.A. 2)), did not proscribe *every* means of enmeshing neutral employers and the public in disputes not their own. However, this clearly does not license achieving such enmeshment by a means which Congress did regard as serious enough to warrant prohibition, i.e., direct appeals to employees. It is one thing to permit an employer to remain free to decide, in the light of normal business considerations, whether he will agree to a union's boycott demands, or, having once agreed, will continue to live up to that agreement; it is quite another thing to have that decision influenced by a work stoppage of his employees, and this is the point at which Congress drew the line.[17] Thus, the facts here show that, notwithstanding the contract between Havstad and Jensen and the Union, the former had instructed its employees to handle Paine doors, and

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[17] This distinction is overlooked when it is contended (see R. 76-77) that, to preclude the union from "enforcing" the contract by direct appeals to the employees, encourages "employers to violate their lawful agreements with labor organizations." The availability to the union of the usual remedies for breach of contract still acts as an inducement to the employer to live up to his agreement with the union; the preclusion of direct employee appeals merely insures that the employer will decide whether to risk these remedies in an atmosphere free of employee pressures.

the employees actually had been handling them; this stopped only after Business Agent Fleisher arrived on the scene and ordered work on the doors to be discontinued (pp. 3-4, *supra*). See *McAllister Transfer, Inc.*, 110 NLRB 1769, 1773-1774, 1790.

2. The legislative history of Section 8(b)(4)(A) indicates that Congress intended to ban the type of activity involved here, irrespective of employer consent to the union's program. Thus, as illustrative of the kinds of cases which Section 8(b)(4)(A) was designed to prevent, Senator Taft cited (93 Cong. Rec. 4198-4199):

> the case of the New York Electrical Workers Union [Allen Bradley], which said, "We will not permit any material made by any other union or by any nonunion workers to come into New York City and be put in any building in New York City."

the situation where:

> . . . All over the United States, teamsters are saying, "We will not handle this lumber, because it is made in a plant where a CIO union is certified" . . . .

and the situation, identical to that here, where:

> . . . all over the United States, carpenters are refusing to handle lumber which is finished in a mill in which CIO workers are employed, or, in other cases, in which American Federation of Labor workers are employed.[18]

[18] Similarly, in explaining the effect of Section 8 (b) (4) (A), which was derived from the Senate Bill, the Senate Report (No. 105, 80th Cong., 1st Sess., p. 22) states:

> [It is] an unfair labor practice for a union to engage in the type of secondary boycott that has been conducted in New

In the *Allen Bradley* case, *supra,* the unions conducting the product boycott were doing so not only with the consent of their employers but also with their active cooperation (see the Supreme Court opinion in the case, 325 U. S. 797, 799-800). Moreover, at the time that Congress was considering the other situations described above, the practice of securing the employer's consent in advance to boycott a product, by means of a "hot cargo" clause in the collectvie bargaining contract, was already established.[19] This was particularly true of respondents' international, the United Brotherhood of Carpenters, which, since early in 1900, has implemented its union label policy by arrangements and agreements with the contractors and other employers of its members.[20] Accordingly, it is reasonable to assume that Congress was well aware of the factor of employer acquiescence, but nevertheless decided to ban union in-

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York City by Local No. 3 of the I.B.E.W., where electricians have refused to install electrical products of manufacturers employing electricians who are members of some labor organization other than Local No. 3 (See testimony of R. S. Edwards, vol., 1, p. 176, *et seq.; Allen Bradley Co.* v. *Local Union No. 3, I.B.E.W.,* 325 U.S. 797).

See also, 93 Cong. Rec. 4863 (Senator Morse); *Hearings before the Senate Committee on Labor and Public Welfare, on S. 44 and S. J. Res. 22,* 80th Cong., 1st Sess., pp. 381-398, 1715-1729.

[19] See e.g., *American Newspaper Publishers Assoc.,* 86 NLRB 951, 970-971; *Rabouin, d/b/a Conway's Express,* 87 NLRB 972, 1020. U. S. Dept. of Labor, Bureau of Labor Statistics, *Union Agreement Provisions* (G.P.O., 1942), pp. 32, 165; The Bureau of National Affairs, *Collective Bargaining Contracts* (Washington, D.C., 1941), pp. 394-395; Loft, *The Printing Trades* (Farrar & Rinehart, 1944), pp. 219-220; N.Y. State Dept. of Labor, *Provisions of Teamsters' Union Contracts in New York City* (1949), p. 36.

[20] See Christie, *Empire in Wood, A History of the Carpenters' Union* (Cornell 1956), pp. 161-169, 312-313; *U.S.* v. *Brims,* 272 U.S. 549; *Paine Lumber Co.* v. *Neal,* 244 U.S. 459, 469-470; *Bossert* v. *Dhuy,* 221 N.Y. 342, 117 N.E. 582.

ducement of employee refusals to work on an unfavored product irrespective of that factor.

3. This conclusion is consistent with the language of Section 8 (b) (4) (A). Literally, the "concerted refusal" phrase proscribes inducing employees to refuse, while at work, to perform a task which they would have done absent the inducement. Since, as we have shown (pp. 3-4), this occurred here, "the employees did refuse in the ordinary sense of that word" (*Amalgamated Meat Cutters* v. *N. L. R. B.*, C. A. D. C., decided June 22, 1956, slip op., p. 7, 38 LRRM 2289, 2292). Section 8 (b) (4) (A) contains no express qualification for cases where the employer has agreed to the refusal, and no reason appears for supplying such qualification by implication. When, in other sections of the Act, Congress has intended to qualify an otherwise blanket prohibition, it has done so specifically.[21] Nor is the condition of employer non-consent necessarily imported into the term "concerted refusal" because it is preceded by the word "strike" and followed by the phrase "in the course of their employment", and the illegal objective is defined in terms of "forcing or requiring" (see p. 18, *supra*).

Section 501 of the Labor-Management Relations Act, 1947, Title I of which encompasses the National Labor Relations Act, as amended, defines the term "strike" to include "any strike or other concerted stoppage of work by employees . . . and any concerted slowdown or other concerted interruption of operations by employees." Accordingly, partial strikes and other instances of employee "insubordination" short of a full strike would be included within the term "strike" used

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[21]See the provisos to Sections 8 (b) (4) (B), 8 (b) (4) (D), 8 (b) (1) (A), 8 (a) (3) and 8 (a) (2).

in Section 8 (b) (4) (A), and it is not necessary to view the term "concerted refusal" as merely providing for that type of conduct. Moreover, when it is remembered that Congress did not wish to interdict in Section 8 (b) (4) (A), *inter alia,* appeals to consumers (see *N. L. R. B.* v. *Service Trade Chauffeurs,* 191 F. 2d 65, 68 (C. A. 2)), there is ample reason to conclude that the phrase "in the course of their employment" was inserted solely "to distinguish between employees in their capacity as employees and employes in their capacity as consumers" (R. 61-62).[22] Finally, the illegal objective is defined as "forcing or requiring any employer or other person;" even if the employer acquiesces, his employees' refusal to handle a product, though it may not "force," "requires" similar action on his part, in the sense that it necessarily curtails the employer's continued use of the product as well.[23] Indeed, nothing "could have been more successful in 'requiring' " such action by the employer (*Amalgamated Meat Cutters* v. *N. L. R. B.,* C. A. D. C., decided June 22, 1956, slip op., p. 9, 38 LRRM 2289, 2293).

Accordingly, the Board properly rejected the respondents' contention that the possible acquiescence of Havstad and Jensen immunized the inducement of their employees to stop handling Paine doors from the ban of Section 8 (b) (4) (A).

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[22] There is no question that the men were acting in their capacity as employees when the orders to stop handling Paine doors were given. Here, unlike in *Joliet Contractors Assn.* v. *N.L.R.B.,* 202 F. 2d 606, 609 (C.A. 7), cert. den., 346 U.S. 824, they were at work for a particular employer, and were actually distributing and hanging doors when Business Agent Fleisher intervened.

[23] As shown (p. 20, *supra*) the employee refusal also has a "forcing" effect when consideration is given to its impact on the other neutral employers and on the public.

D. *The Board properly concluded that, when Steinert stopped the employees from handling the Paine doors, he was acting in his capacity as an agent of respondents*

Finally, respondents contend that Steinert's action in stopping the handling of the nonunion doors cannot be attributed to them because Steinert was acting as an agent of Havstad and Jensen. This is based on the assumption that, since, as foreman for Havstad and Jensen, Steinert was empowered to issue work instructions to the employees, he was necessarily acting in that capacity when he instructed them to discontinue work on the Paine doors. That is, it was just as though the Union had asked one of the Havstad and Jensen partners to instruct his employees to stop such work, and the partner had done so. The Board properly rejected this contention.

Thus, Steinert was a member of a constituent local of Respondent District Council, as was required of carpenter foremen under the District Council's By-Laws and Trade Rules, and was vested with the authority and responsibility of enforcing the By-Laws and Trade Rules, including the one barring members from handling nonunion materials. Indeed, Section 20 (f) of the By-Laws and Trade Rules provided that "foremen are to be held equally responsible (the same as the Steward) for the enforcement of all By-Laws and Trade Rules of the District Council. Violators of this paragraph shall be subject to a fine of $100.00 and/or expulsion." (R. 199). Accordingly, when Business Agent Fleisher ordered Steinert to stop the work on the doors because they were nonunion, it is reasonable to conclude that Fleisher was invoking Steinert's obliga-

tions under the Union's rules and made him the Union's agent for their enforcement. See *N. L. R. B.* v. *Cement Masons Local No. 555,* 225 F. 2d 168 (C. A. 9); *N. L. R. B.* v. *I. L. W. U.,* 210 F. 2d 581 (C. A. 9). "The fact that [persons] may also be agents of employers does not eliminate them from the scope of" Section 8 (b) (4) (A) (*Amalgamated Meat Cutters* v. *N. L. R. B.,* C. A. D. C., *supra,* slip op. p. 5, 38 LRRM 2289, 2291).

That Steinert was enlisted in his Union, rather than his "employer," capacity is confirmed by the fact that Fleisher went to Steinert instead of to General Superintendent Nicholson. The latter was charged with the responsibility of planning the work, and was the management official who normally dealt with Business Agent Fleisher with respect to management-union matters (R. 106, 112-113, 129-131, 132, 160). Steinert, on the other hand, merely relayed Nicholson's orders to the employees (R. 106, 132). It is significant, moreover, that Fleisher did not ask Steinert to stop work in accordance with the "hot cargo" provision of the collective bargaining contract, as would be expected if he were appealing to him as a management representative. Instead, Fleisher merely ordered Steinert to stop until it was ascertained whether the doors were union-made, and proceeded to stand by to see that this directive was carried out (*supra,* p. 4). And, when Nicholson arrived shortly thereafter, Fleisher, in the presence of Steinert and carpenter Finkelstein, told him that "he had orders from the District Council that morning to stop them from hanging the doors," and added that he "could have pulled them off yesterday but . . . waited until today." (R. 54; 116-117).

Finally, it should be noted that, in his capacity as a

foreman for Havstad and Jensen, Steinert had been ordered by Superintendent Nicholson to have the doors distributed and hung (R. 110, 162-164). Hence, when, contrary to the instructions of the superintendent, Steinert carried out the orders of Union Business Agent Fleisher, it is patent that he discarded his management responsibilities and was undertaking to act in his capacity as an agent of the Union in enforcing its Trade Rules.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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JULY, 1956.

APPENDIX

The relevant provisions of the Labor Management Relations Act, 1947, including the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Sec. 141, *et seg*), are as follows:

SECTION 1. * * *

(b) * * *

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

TITLE I-AMENDMENT OF NATIONAL LABOR RELATIONS ACT

* * * * *

SEC. 8.(a) It shall be an unfair labor practice for an employer—* * *

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it:

Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 9(f), (g), (h) * * * *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms

and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or

otherwise, dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

* * * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * *

TITLE V

SECTION 501. When used in this Act—

* * * * *

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

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